No. 95-1427

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RYE PSYCHIATRIC HOSPITAL CENTER, INC.,

Petitioner,

—against—

RICHARD C. SURLES, Ph.D., Commissioner of the Office of Mental Health of the State of New York, and GREGORY KALADJIAN, Acting Commissioner of the State of New York, Department of Social Services,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner, Rye Psychiatric Hospital Center, Inc. ("petitioner"), is a private, for-profit psychiatric hospital with approximately 35 beds. Petitioner commenced the underlying proceeding in State Supreme Court, seeking, *inter alia*, a retroactive 5% upward "disproportionate share adjustment" of its Medicaid reimbursement rates for the 1986 through 1991 rate years, even though it already received 100% Medicaid

reimbursement for its Medicaid patients and operated at a profit. State Supreme Court, Albany County, denied this relief, and the State Appellate Division, Third Department, affirmed. Both courts held that petitioner was not entitled to the disproportionate share adjustment because New York, through its bad debt and charity pools for general hospitals, had received a "special rule exemption" from the disproportionate share adjustment requirement. The State Court of Appeals denied petitioner's motion for leave to appeal. The petition for a writ of certiorari should be denied because the State courts did not decide a federal issue when they denied petitioner's request for a disproportionate share adjustment. Moreover, the equal protection claim alleged here was not alleged in the State court petition or amended petition and the State courts did not, therefore, address it. In any event, since private psychiatric hospitals such as petitioner can turn away patients based on ability to pay and thereby operate at a profit, whereas the deficit-ridden hospitals of the State Office of Mental Health ("State OMH") must accept all comers, it was rational for the State not to have pursued disproportionate share adjustment plan amendments for the private psychiatric hospitals. Finally, petitioner's claims pursuant to 42 U.S.C § 1983 for retroactive monetary relief against the State are barred by sovereign immunity.

STATEMENT OF THE CASE

A. The Special Rule Exemption To The Disproportionate Share Requirement

Medicaid is a joint federal and state program which provides medical care to those who otherwise would be unable to afford it. 42 U.S.C. §§ 1396, *et seq*. The program is administered by the states in accordance with a plan that must be approved by the United States Department of Health and Human Services ("HHS"), Health Care Financing Administration ("HCFA"). 42 U.S.C. § 1396a(b); *see generally* 42

CFR Part 447. In accordance with 42 U.S.C. § 1396a(a)(5), the State Department of Social Services ("State DSS") is the single state agency designated to administer the Medicaid program for the State of New York. N.Y. Social Services Law § 363-b (McKinney 1992). Other New York State agencies have regulatory responsibility over institutional Medicaid providers: the Department of Health ("State DOH") establishes the Medicaid reimbursement rates for general hospitals; State OMH sets the rates for freestanding psychiatric hospitals.

A state Medicaid plan must set forth the method for reimbursing health care providers. Under the Boren Amendment to the Medicaid Act, the state must make assurances satisfactory to the Secretary of HHS that reimbursement rates are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. 42 U.S.C. § 1396a(a)(13)(A). One of the requirements for a state Medicaid plan or plan amendment is that it provide for "methods and standards used to determine payment rates [which] take into account the situation of hospitals which serve a disproportionate number of low-income patients with special needs." 42 CFR 447.253(b)(ii)(A). *See also* 42 U.S.C. § 1396a(a)(13)(A) ("disproportionate share provision") and § 1396r-4(a),(e) ("special rule exemption"). In 1987, Congress enacted the Omnibus Budget Reconciliation Act, P.L. 100-203 ("OBRA"), which contained amendments that sought to effectuate the states' compliance with the disproportionate share provision. *See* H.R. Rep. No. 101-247, 101st Cong., 1st Sess., p. 481.

Pursuant to section 4112 of OBRA, states were required to submit plan amendments, effective July 1, 1988, to implement the disproportionate share requirement, except that states which satisfied OBRA's "special rule" exemption to the disproportionate share provision did not have to submit such plan amendments. A state satisfied the special rule exemption and was deemed to be in compliance with the disproportion-

ate share provision of 42 U.S.C. § 1396a(a)(13)(A) if (1) the state's plan "provided for payment adjustments based on a pooling arrangement involving a majority of the hospitals participating under the plan for disproportionate share hospitals as of January 1, 1984 . . .", and (2) "the aggregate amount of the payment adjustments under the plan for such hospitals is no less than the aggregate amount of such adjustments" in the absence of an exemption. 42 U.S.C. § 1396r-4(e).

Only states which did not qualify for the special rule exemption were required to submit plan amendments which provided for minimum "payment adjustments" to disproportionate share hospitals. Under the plan amendments, a "disproportionate share hospital" was defined as one whose aggregate patient revenues from Medicaid and state and local cash subsidies exceed 25% of its total patient revenues. 42 U.S.C. § 1396r-4(b).

In early 1988, HCFA advised State DSS of OBRA's provisions regarding the disproportionate share requirement and sought to ascertain how the State of New York proposed to comply. By letter dated May 17, 1988, State DSS replied by requesting HCFA to grant New York the special rule exemption under OBRA for general hospitals regulated by State DOH. State DSS represented that New York had been complying with the disproportionate share provision of § 1396a(a)(13)(A) for such general hospitals since 1983, by way of a bad debt and charity pool to aid general hospitals serving those unable or unwilling to pay for inpatient services. In a letter dated August 22, 1989 which State DSS forwarded to HCFA, State DOH estimated that New York's payments from its bad debt and charity care pools totaled $91 million, whereas the State's disproportionate share payments would be approximately $39 million if it were not exempt by special rule from OBRA's disproportionate share requirement.

In addition, by letter dated June 30, 1988, State DSS submitted plan amendments for revisions to the reimbursement methodology utilized by State OMH for the facilities which

it regulated. The amendments provided for disproportionate share adjustments to be paid to OMH-operated public psychiatric hospitals (NY 88-29), private psychiatric hospitals (NY 88-30), and residential treatment facilities (NY 88-31).

By letter dated February 27, 1990, HCFA informed State DSS that it had approved New York's request for the special rule exemption. (Appendix F to the Petition at 39a-40a.) HCFA added that "[s]ince this special rule should be applied on a statewide basis including psychiatric and specialty hospitals, you may wish to withdraw previously submitted Plan amendments which are currently pending (NY 88-30, NY 88-31)." *Id.* In accordance with HCFA's suggestion, State DSS did withdraw these plan amendments covering private psychiatric hospitals and residential treatment facilities. HCFA subsequently approved the plan amendments for OMH-operated facilities.

HCFA concluded that New York was applying the special rule exemption from the disproportionate share adjustment requirement on a statewide basis. HCFA stated that the statewide requirement was met if a "majority of hospitals as of January 1, 1984" participated in a pooling arrangement that otherwise satisfied the requirements for a special rule (R. 163).[1] HCFA then added that New York's general hospitals covered by the State's bad debt and charity care pool represented a "majority of hospitals" in New York as of that date, even though private psychiatric hospitals and residential treatment facilities did not participate in any pooling arrangement (R. 162-63).

B. The State Court Decisions

Petitioner commenced this proceeding in Supreme Court, Albany County, pursuant to article 78 of the New York Civil Practice Law and Rules ("CPLR"), challenging State OMH's adoption of a "minimum utilization factor" to compute peti-

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[1] "R__" refers to the Record on Appeal in the State courts.

tioner's Medicaid reimbursement rates.[2] As originally drafted, the petition did not raise a claim that petitioner was entitled to a disproportionate share adjustment to its Medicaid reimbursement rates. Rather, petitioner brought the proceeding to implement retroactively the decision of the federal district court in *Rye Psychiatric Hospital Center, Inc. v. Surles*, 768 F. Supp. 82 (S.D.N.Y. 1991), which nullified the regulation establishing the minimum utilization factor.[3]

In its amended pleading, petitioner alleged that without the minimum utilization factor, it was entitled to a 5% disproportionate share adjustment pursuant to 42 U.S.C. §§ 1396r-4(c) and 1395ww(d)(5)(F)(iv)(II) for rate years 1986 through 1991. Petitioner brought its claims for retroactive disproportionate share adjustments to its 1986 through 1991 Medicaid reimbursement rates pursuant to 42 U.S.C. § 1983, and petitioner sought attorney's fees under 42 U.S.C. § 1988. Petitioner also asserted that "[r]espondents' refusal . . . to determine Rye's status as a disproportionate share hospital for the period January 1, 1986 to the present *without use of the minimum utilization adjustment*" denied it equal protection and due process. The amended petition did not assert the equal protection violation alleged in the petition for certiorari based

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[2] The minimum utilization factor was designed to discourage hospitals from underutilizing certified bed space and to encourage more efficient and economical operation. In calculating a psychiatric hospital's Medicaid reimbursement rate using the minimum utilization factor, OMH would "impute" enough patient days of care to an underutilized hospital to meet the minimum utilization requirement of seventy-five percent of a hospital's certified beds. In each of the rate years at issue, petitioner failed to fill enough of its certified beds to meet the minimum utilization requirement and its rates were, accordingly, calculated in part on the basis of imputed days.

[3] The district court held that the State had not made formal findings, as required by the Boren Amendment, that the regulation yielded rates which "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. 42 U.S.C. § 1396a(a)(13)(A)." 768 F. Supp. at 86-89.

on the receipt by OMH hospitals of disproportionate share adjustments. (*See* Respondents' Appendix.)

In July 1992, Supreme Court, Albany County, granted the article 78 petition to the extent of directing respondents to recompute petitioner's Medicaid reimbursement rates for the years 1986 through 1991 without the reduction imposed by the minimum utilization factor. With regard to petitioner's request for an additional 5% payment on the ground it qualifies as a disproportionate share hospital, the court concluded that a hearing was needed to determine whether the State had an exemption from the disproportionate share requirement. (Appendix E to the Petition, at 19a-22a.)

The hearing was held in February 1993. Respondents introduced an affidavit and supporting documentation from the Regional Director of HCFA's Division of Medicaid, stating that on February 27, 1990, New York had been approved for a special rule exemption from the disproportionate share requirement because it had a pooling arrangement involving public, voluntary and proprietary general hospitals, providing financial aid to those hospitals which serve patients unable or unwilling to pay for inpatient services (R. 158-64). HCFA found that the general hospitals in the bad debt and charity pool represented a majority of the disproportionate share hospitals in New York as of January 1, 1984 (R. 162-63).

The HCFA documentation introduced at the hearing also stated that HCFA was aware that private psychiatric hospitals were not included in the bad debt and charity pool or any other pooling arrangement, but that the State's existing pooling arrangement alone satisfied the requirements for the statewide exemption from the disproportionate share payment adjustment, since it involved a majority of the State's hospitals.[4] HCFA stated further that it intended the exemption

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[4] Private psychiatric hospitals comprise approximately 5% of all hospitals in New York State and their total bed capacity represents an even smaller percentage of total hospital beds statewide.

to apply statewide and to cover psychiatric hospitals not included in any pooling arrangement.

In June 1993, State Supreme Court found from the evidence at the hearing that HCFA had granted New York a special rule exemption from the disproportionate share requirement based on the State's representation that it had a bad debt and charity pooling arrangement involving general hospitals as of January 1, 1984. (Appendix D to the Petition at 14a.) The court also concluded that petitioner's equal protection claim must be dismissed because there was a rational basis for the State to exclude private psychiatric hospitals such as petitioner from the pooling arrangement, which is intended to reduce the deficits experienced by public hospitals as providers of last resort. The court stated that private psychiatric hospitals, by contrast, receive 100% Medicaid reimbursement and operate at a profit because they can turn away patients based on inability to pay. *Id.* at 14a-15a. State Supreme Court's decision did not address whether respondents violated petitioner's equal protection rights by obtaining disproportionate share adjustments for State OMH hospitals but not for private psychiatric hospitals, since the issue was not raised in the petition or amended petition.

In an order entered on August 3, 1995, the Appellate Division, Third Department, held that the State did not have to include a disproportionate share adjustment in the rate paid to disproportionate share hospitals because "Supreme Court's finding that the State has an exemption under the 'special rule' from the Boren Amendment's disproportionate share adjustment requirement is correct." (Appendix B to the Petition at 4a-5a.) The Third Department rejected petitioner's contention that the State was required to prove that it was entitled to the exemption, noting that federal law (42 U.S.C. § 1396r-4(e)) does not require states to make findings in support of its request for an exemption under the special rule, and the special rule does not implicate the Boren Amendment's requirement for findings since such request does not involve

a change in payment method or standards (citing 42 CFR 447.253(b)). *Id.* at 5a. The court concluded that "petitioner had the burden of proof on the issue of compliance with the Medicaid laws (*see*, *Multicare Medical Ctr. v. Washington*, 668 F. Supp. 1349, 1389)." *Id.* at 4a-5a.

The Third Department then rejected petitioner's equal protection claim that its exclusion from the bad debt and charity pools that are available to the State's major public hospitals and voluntary and private proprietary hospitals violated equal protection. The court concluded that "there is a rational basis for excluding private psychiatric hospitals from receiving allowances from the subject pools" (*id.* at 6a) because the purpose of the bad debt and charity pools established by the State's Public Health Law is to cushion the losses sustained by general hospitals from bad debts and the costs of charity care, "the record evidence shows that private psychiatric hospitals have a relatively low percentage of uncompensated care patients and are profitable enterprises," and petitioner offered no proof on this issue.

Petitioner then moved for permission in the State Court of Appeals to appeal the Third Department's order. The Court of Appeals denied the motion by order entered December 7, 1995. (Appendix A to the Petition, at 1a.)

REASONS FOR DENYING THE WRIT

A. Petitioner's Challenge To The State Courts' Findings That The State Has A Special Rule Exemption From The Disproportionate Share Adjustment Requirement Does Not Raise A Federal Issue For This Court's Review

State Supreme Court, following an evidentiary hearing, found that the State was granted a special rule exemption from the disproportionate share adjustment requirement in the 1987 OBRA. The State, through its special rule exemption,

has thus satisfied OBRA and is not required to provide disproportionate share adjustments to private psychiatric hospitals such as petitioner, even though they do not participate in the bad debt and charity pools. Since the State is exempt by special rule, petitioner is not entitled to any disproportionate share adjustments under 42 U.S.C. § 1396r-4, even if it were to otherwise demonstrate its eligibility.[5]

Petitioner now asserts that the State courts erred in concluding that the State was entitled to the special rule exemption. (Petition at 16-20.) The Court should not grant the writ of certiorari to review the question of whether the exemption was properly granted to the State, since this was not the issue before the State courts. Nor did petitioner seek relief from HCFA, the federal agency that granted the exemption. Indeed, the State courts would not have had jurisdiction to invalidate HCFA's determination granting the exemption to the State based on the State's bad debt and charity pools in effect on January 1, 1984.

Accordingly, the only questions which can be raised in this petition are whether the evidence at the hearing established the existence of the State's special rule exemption based on its pooling arrangements, and whether petitioner met its burden of proof in the context of the State court article 78 proceeding. Since neither question raises a federal issue and both were correctly decided, the writ should be denied.

B. Petitioner's Equal Protection Challenge Does Not Merit This Court's Review

Petitioner's equal protection argument as now framed to this Court was not properly raised in the State court proceedings. The amended petition alleged only that respondents

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[5] Petitioner erroneously claims that it qualifies as a disproportionate share hospital because it has a 25% low-income utilization rate. In the State courts, respondents disputed petitioner's claim and the courts never expressly found that petitioner qualified as a disproportionate share hospital.

violated its equal protection rights by failing to take into account the elimination of the minimum utlization factor in determining whether petitioner was a disproportionate share hospital. In the Appellate Division, petitioner alleged that it was denied equal protection by its exclusion from the bad debt and charity pools, and because it is unable to obtain a disproportionate share adjustment whereas State OMH hospitals receive such adjustments. Petitioner now bases its equal protection claim only on its alleged disparate treatment compared to State OMH hospitals. Although petitioner raised this argument in the Appellate Division and in its motion for leave to appeal to the State Court of Appeals, it was not preserved because it was not raised in the petition or amended petition. Accordingly, the State courts did not address it. Since petitioner did not follow state procedures for the preservation of claims with regard to the equal protection issue presented in its petition for certiorari, it is not preserved for this Court's review.

In any event, the State's decision, at HCFA's suggestion, to withdraw the plan amendments to provide disproportionate share adjustments for private psychiatric hospitals did not violate equal protection. A State's classification in the area of economics will survive an equal protection challenge so long as the classification has a rational relation to a legitimate State objective. *See Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981); *Western and Southern Life Insurance Co. v. State Board of Equalization of Califiornia*, 451 U.S. 648, 656-57 (1981). Here, the State, with HCFA's approval, implemented plan amendments to provide disproportionate share adjustments to State OMH hospitals because these hospitals are providers of last resort and incur huge deficits. The State, also with HCFA's approval, chose not to pursue plan amendments for the private, for-profit psychiatric hospitals such as petitioner because they can turn away patients who are unable to pay and are thus able to operate at a profit.

As providers of last resort, public hospitals are required to admit and treat patients regardless of ability to pay (R. 125-30). Accordingly, they provide a large volume of uncompensated care and operate at huge deficits aggregating about a half billion dollars per year, which are reduced only in part by the disproportionate share adjustments (R. 125-30). By contrast, private psychiatric hospitals generally operate at a profit (R. 125-30). Petitioner's bad debt in 1990, for example, was only 1.5% of its total hospital charges (R. 61, 129). Furthermore, the Medicaid rates set for private psychiatric hospitals cover the full cost of their Medicaid patients (R. 144.)

Petitioner thus received its full Medicaid reimbursement rate for treating its Medicaid patients. State OMH hospitals, by contrast, do not receive any reimbursement or payment for the majority of their patients. Although over 90% of the patients at OMH hospitals are Medicaid "eligible," 60-70% of those patients do not receive Medicaid because of Medicaid's exclusion for patients between the ages of 22 to 64 years old in institutions for mental diseases. (R. 130, 144). Accordingly, disproportionate share adjustment payments to private psychiatric hospitals would unduly enrich them.[6] As the Appellate Division noted, petitioner offered no proof to the contrary. Since private psychiatric hospitals such as petitioner can select patients based on ability to pay and thereby generate a profit, whereas OMH hospitals cannot, it was rational for the State not to have pursued disproportionate share adjustment plan amendments for the private psychiatric hospitals.[7]

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[6] Petitioner erroneously suggests that disproportionate share adjustments go to Medicaid patients (Petition at 21); such payments go to hospitals, not patients.

[7] Beginning in 1992, the federal government placed a cap on disproportionate share adjustment payments for each state. Accordingly, requiring the State to make disproportionate share adjustment payments to profitable private psychiatric hospitals would reduce the amount of disproportionate share funds available to deficit-ridden State OMH hospitals.

Therefore, petitioner's equal protection claim, even if it were preserved, does not merit this Court's review.

C. Petitioner's Claim For Retroactive Monetary Relief Is Barred By Sovereign Immunity

In the amended petition, petitioner alleged that respondents' failure to provide it with disproportionate share adjustments to its prior Medicaid reimbursement rates violated its rights under 42 U.S.C. § 1983. Petitioner sought retroactive monetary damages and also attorney's fees under 42 U.S.C. § 1988. However, 42 U.S.C. § 1983 does not authorize claims against states or suits against state officials acting in their official capacities for money damages and other retroactive relief. *Will v. Michigan*, 491 U.S. 58, 71 (1989). Here, respondents were sued in their official capacities for retroactive adjustments to petitioner's 1986-1991 Medicaid rates. Such relief is against the State, payable out of the State treasury and, accordingly, not cognizable under § 1983.[8]

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[8] Even assuming that there was merit to petitioner's claims and that retroactive monetary relief was not jurisdictionally barred, petitioner still would not be entitled to its claimed 5% disproportionate share adjustment until the following occurred. First, the State would need a disproportionate share plan amendment approved by HCFA for private psychiatric hospitals. Second, petitioner would have to show that it is a disproportionate share hospital, since it erroneously included as Medicaid revenue Medicare payments to its patients who are "qualified medicare beneficiaries." The payments for such QMBs are Medicare, not Medicaid, payments. *See New York City Health and Hosps. Corp. v. Perales*, 954 F.2d 854 (2d Cir. 1992), *cert. den.*, ___ U.S. ___, 113 S. Ct. 461 (1992). Without inclusion of these Medicare revenues, petitioner would not qualify as a disproportionate share hospital, except for rate year 1991. Third, even if petitioner qualified as a disproportionate share hospital, the Medicaid Act provides the states with three options for making disproportionate share adjustment payments in the absence of a "special rule" exemption and does not automatically require the 5% upward adjustment which petitioner claims. 42 U.S.C. § 1396r-4(c).

CONCLUSION

The petition for a writ of certiorari should be denied. New York State is not in violation of the Boren Amendment to the Medicaid Act because the State has a special rule exemption from the disproportionate share adjustment requirement. Petitioner's claim that the exemption was improperly granted by HCFA was not, and could not have been, decided by the state courts, and does not therefore raise a federal issue. Petitioner's equal protection claim is not preserved for review by this Court because it was not properly raised in the state courts. In any event, it was rational for the State, with HCFA's approval, not to have pursued disproportionate share adjustment plan amendments for the private psychiatric hospitals since they can turn away patients based on ability to pay and operate at a profit, whereas the deficit-ridden State OMH hospitals must accept all comers. Finally, petitioner could not, in any event, obtain retroactive monetary damages in the State courts pursuant to 42 U.S.C. § 1983.

Dated: New York, New York
April 29, 1996

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